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No. 86-109

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ANDREW DELUCCHI and DOROTHY G. S. DELUCCHI,
Appellants,

VS.

THE COUNTY OF SANTA CRUZ and
THE CALIFORNIA COASTAL COMMISSION,
Appellees.

REPLY BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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NOW COME Appellants, ANDREW DELUCCHI and DOROTHY G. S. DELUCCHI and as their Reply Brief in Opposition to the Motion to Dismiss or Affirm, hereby file the following Brief.

I

THE SUPREME COURT MUST REVIEW TWO CONCEPTIONALLY DIFFERENT QUESTIONS WITH RESPECT TO THE DECISION OF THE CALIFORNIA COURT OF APPEAL

The Supreme Court must review two conceptionally different questions with respect to the Decision of the Court of Appeal, namely—: (1) Is the Decision based upon a state ground that is independent and free of entanglement with the Federal question? (2) Even assuming, arguendo (which Appellants do not), that there is an independent state ground, is the state ground adequate

to support the decision of the Court of Appeal? *Michigan v. Long*, (1983) 463 U.S. 1032, 1043.

A. Initially, the Decision of the Court of Appeal is *not* based upon a state ground that is independent and free of entanglement with the Federal question. For example, under contract law in California, every contract has an implied covenant of good faith and fair dealing. *Brown v. Superior Court*, (1949) 34 C2d. 559, 564, 212 P2d. 878. Moreover, such contractual rights of good faith and fair dealing are protected by the United States Constitution. Article One, Section 10, United States Constitution; *Allied Structural Steel Co. v. Spannaus*, (1978) 438 U.S. 234, 241; *Estate of Thramm*, (1947) 80 CA 2d. 756, 765, 183 P2d. 97. Nonetheless, the majority Decision of the California Court of Appeal blithely ignores such constitutionally protected rights.

Further, even aside from the covenants of good faith and fair dealing, the Fifth Amendment, substantive Due Process, require a fundamental fairness. The Fifth Amendment expresses principle of fairness and not a technical rule procedure. *United v. Dickson*, (1947) 331 U.S. 745, 748. Here, the Decision of the California Court of Appeal blithely ignores such Federal rights and a state court cannot deprive a litigant of a federal right by omitting to pass upon the same. See *Brooklyns Saving Bank v. O'Neil*, (1945) 324 U.S. 697, 703; *Merchants' National Bank v. Richmond*, (1921) 256, U.S. 635, 638; *Carlson v. Washington*, (1914) 234 U.S. 103, 105.

B. Furthermore, even assuming, arguendo, there was any independent state of ground, which there is not, there is no "adequate" state ground to support the judgment. The state ground, to be adequate, must be real, tenable, and true and *not* arbitrary or a devise to prevent a review of the Decision upon the Federal question. *Enterprise Irrigation District v. Canal Co.*, (1917) 243 U.S. 157, 164; *Ward v. Love County*, (1920) 253 U.S. 17, 22; *Lawrence v. State Tax Commissioner*, (1932) 286 U.S. 276, 282; *Staub v. Baxley*, (1958) 355 U.S. 313, 320.

Here, the majority in the Decision of the California Court of Appeal is merely using unsupported, legal gibberish. See A-30 to A-33. There, there is reference to the contract. Nevertheless, the

Decision makes no logical or legal connection between the content, itself, and conclusions. The Decision is merely trying to create a so-called "state ground" in order to prevent a review of the Federal question by the United States Supreme Court. The reason for this obfsucation in California is well known. In California there has been a rapid erosion, if not elimination, of private rights of California citizens. *City of Venice v. Venice Peninsula Properties,* (1982) 31 Cal 3d 288, 316 (Dissenting opinion).

For example, this Land Conservation Act contract, drafted by the County, was signed by the landowners in February, 1981 and the Agricultural Preserves (A-P) zone is specifically a part of it. The contract specifically refers to the Agricultural Preserve (A-P) zone five different times and requires that the land be rezoned to Agricultural Preserve (A-P) zone, which it was. Furthermore, prior to the contract, the land use General Plan adopted by the County called for a relatively intense residential-golf course development of the subject property. After the contract was executed, the land, indeed, was rezoned to the Agricultural Preserve (A-P) zone district and the General Plan was amended whereby those land uses were eliminated. Failure by the court to protect the rights of the Delucchis would damage them in excess of $2,000,000.00. Appendix B, A 9-13 (See also RT pages 58-84-85). Moreover, prior entering into this contract, promises, representations and inducements were made to the Delucchis by the County officials that the then existing Agricultural Preserve (A-P) zone including the then permitted uses would not be changed and it would remain in same during the life of the agreement. A-10, A-39. the landowners, to their substantial detriment, reasonably and irreversibly relied upon such represents and inducements. A-10, A-39. Had such assurances, representations, and inducements not been made, the Delucchis would never have entered into this contract. A 9-10, A 15-16.

The feeble response of the majority in the Decision is that:

> "except for Clause 3, the contract speaks in terms of use restrictions either imposed by the County or agree to by Plaintiff owners. Only in Clause 3 is there any language which purports to bind the County, and this language, once

again, refers to uses, and not to the right of the County to regulate those uses." A-33.

Initially, especially since the County drafted the contract and was dealing directly with lay people, there is absolutely no distinction between "uses" as against "regulate" uses. Furthermore, Clause 3 is, indeed, part of the contract and it does, as admitted by the majority in the Decision, bind the County to the uses of the Agricultural Preserve (A-P) zone at that time.

Furthermore, the Decision, ignoring the contract itself, blithely ignores the clear language of the contract including provisions such as the following: (1) "... the within contract is made and entered into pursuant to the Land Conservation Act of 1965." Clause 3, A-44. (2) "... during the term of this contract, the above-described land shall be used for the commercial production of agricultural commodities and/or those compatible uses allowed in the Agricultural Preserve (A-P) Zone of the County zoning ordinance." Clause 2, A-44-45. (3) "... County agrees not to authorized any uses OTHER THAN THOSE PERMITTED BY THE COUNTY ZONING ORDINANCE IN THE AGRICULTURAL PRESERVE (A-P) ZONE.... Clause 3, A-45, (Emphasis added). In addition to the foregoing, there are other references to the Agricultural Preserve (A-P) zone. A-44-47. The majority in the Decision is merely attempting to obfuscate the violation of federal constitutional rights.

Moreover, after a two day trial, the trier of fact, the Superior Court, determined that:

A. "Most land owners would have significant reluctance to sign any long term contract, such as a Williamson Act (Land Conservation Act) Contract, unless he/she was assured that the land use regulations during the term of the contract would remain the same. Among other items, the landowner cannot weigh the various considerations in a Williamson Act (Land Conservation Act) Contract unless the zoning, zoning regulations, and text including the permitted uses thereunder remain the same and are known during the life of the proposed contract." Appendix B, A-14.

B. "The original contract between the County and the landowner provided and it was intended that there be the land uses as set forth in the Agricultural Preserve District regulation and text existent at the time of the contract as part of the contract. Among other items, to eliminate those land uses as a matter of right, constitutes a breach of the contract between county and landowner." Appendix B, A-16.

C. ". . . the Contract Clause of both the United States Constitution and the State Constitution is not a dead letter and it does impose limits upon the power of the Defendants to impair the existing contractual relationships between the County and the landowner . . . the contract are (is) not invalid as an unlawful delegation of the police power . . . the policy to preserve agricultural lands and encourage landowners to enter Williamson Act (Land Conservation Act) contracts outweighs the policy against contracting away police powers." Appendix B, A-14.

Furthermore, in the Decision, the concurring opinion, written by Judge Brauer, was more candid and clearly pointed out that the purported "state ground" (according to Appellees) is "beside the point". A-39. Justice Brauer pointed out that the unrefuted evidence shows that the Delucchis' were induced to enter into this agreement with the County based upon the County's representation that the then existing zone would remain in effect during the life of the agreement and that "such inducement may always be proved by parole evidence . . .". A-39. Justice Brauer went on to further state, "I would base the decision squarely on *Avco Community Developers, Inc. v. South Coast Regional Commission*, (1976), 17 Cal.3d 785, 800," which, in turn, states, according to the California Supreme Court, that ". . . it is settled that the government may not contract away its rights to exercise the police power in the future." IBID, 800. Yet, according to the United States Supreme Court, there *are* federal constitutional limits imposed by, inter alia, the Contract, Taking, and Due Process Clause of the federal constitution on the exercise of the police power. *Allied Structural Steel Co. v. Spannaus*, (1978) 438 U.S. 234, 241; *Energy Reserves Group v. Kansas Power and Light Co.*, (1983) 459 U.S. 400, 412; *Armstrong v. United States*, (1960) 364 U.S. 40.

Moreover, if the United States Supreme Court is to meet its constitutional responsibilities, it cannot permit itself to be "completely bound by state court determination of any issue essential to this decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." *Stein v. New York*, (1953) 346 U.S. 156, 181. Also, this Court has the freedom to make independent fact determinations, whether the fact finding below be that of a state court or a state jury. Nothing precludes rejection of findings where federal constitutional rights are at stake and where those rights may depend upon the competency, legal affect, or sufficiency of the evidence submitted to the trier of fact, or the theory of the submission. See eg. *Creswill v. Knights of Pythias*, (1912) 225 U.S. 246, 262.

II

THE VIOLATION OF THE DELUCCHIS' FEDERAL CONSTITUTIONAL RIGHTS ARE PROPERLY BEFORE THIS COURT

As previously set forth, the Delucchis, based upon the inducements and representations of the County officials, irreversibly changed their position and entered into this contract. A-39. But for such inducements and representations by the County officials, the Delucchis would not have entered into this contract. A-9-10; A-15-16 (Also in RT pages 69, 27, and 47). At all times, the landowner asserted their Federal constitutional rights with Appellees. A-12.

The California Coastal Commission argues that the constitutional claims of "taking" are purportedly "premature" citing *MacDonald et al. v. Yolo County*, (1986) 54 U.S.L.W. 4782; *Agins v. City of Tiburon*, (1980) 447 U.S. 255. Nevertheless, neither case is dispositive or even applicable. Among other items, the cases cited by the California Coastal Commission did *not* involve specific representations and inducements by public officials; any irreversible change of position to the substantial detriment of the landowner; any written contracts between the public agency and the landowner; and an agricultural preserve zone part of a written contract.

Appellee totally ignores the contract between the landowner and public agency as though it did not exist. Nevertheless, both the United States Constitution and this Court have not. *Allied Structural Steel Co. v. Spannaus*, (1978) Supra; *Energy Reserves Group v. Kansas Power and Light Co.*, (1983) Supra; Article I, Section 10, United States Constitution.

In addition to the foregoing, the Taking Clause protects intangible assets such as rights secured by contract and the contract, itself, and the same cannot be taken without the payment of just compensation. *Lynch v. Household Finance Corp.*, (1972) 405 U.S. 538, 552; *Armstrong v. U.S.*, (1960) 364 U.S. 40; *City of Oakland v. Oakland Raiders*, (1982) 32 Cal.3d 60, 69 (franchise rights); *Liggett and Meyers v. U.S.*, (1927) 274 U.S. 215, 220 (contract to provide tobacco products); *Porter v. U.S.*, (5th Cir. 1973) 473 F.2d 1329 1333-1335 (right to exploit collector's value); *City of North Sacramento v. Citizens Utilities Co.*, (1961) 192 Cal.App.2d 482 (contract right to do business.) The Delucchis and this Land Conservation Act contract are protected by the Taking Clause as well as other provisions of the Federal constitution.

The Delucchis have always asserted their constitutional rights throughout this process. A-12. This is ripe for adjudication. A-17.

In addition, initially the uses permitted as a matter of right in the Agricultural Preserve Zone District regulation in effect at the time of the execution of this contract were much more expansive and great in number than the comparatively few permitted uses in the present AP regulation of the County. A-15.

Furthermore, even if the County's present Agricultural Preserve Zone District regulations allowed an application to be filed for the same uses that were allowed as a matter of right without any application in the Agricultural Preserve Zone District regulations in effect when this Williamson Act Contract was executed, no reasonable comparison between the two can be made. Among other items, a permitted use as a matter of right is a right of the landowner and *not* discretionary with the public agency. A-16.

Also, a "discretionary permit approval" can impose conditions and restrictions that otherwise could not be imposed on a use

permitted as a matter of right. Further, the County's present Agricultural Preserve Zone District regulations, even assuming that a "discretionary permit approval" had been obtained, are more restrictive in some instances than the uses permitted as a matter of right to the landowner in the Agricultural Preserve Zone District regulations in effect when the Williamson Act Contract was executed. A-16.

Moreover, if a use is permitted as a matter of right under the Agricultural Preserve Zone District in effect when the Williamson Act Contract was executed, the landowner could proceed with that permitted use in a prompt manner at his choosing. Nevertheless, no use is a use at all if a discretionary permit approval application is required. The application process is not only time consuming involving expense to the landowner, but it is, obviously, discretionary with County as to any approval. A-16.

The Appellees are merely using their own wrongful acts in an attempt to "bootstrap" themselves out of the contract and, further, eliminate the constitutional rights of the Delucchis. The Appellees cannot take advantage of their own wrong. Section 3517 of the Civil Code.

There are neither "administrative remedies" existent nor any need, had they been existent, to pursue the same. Appellants sued under, inter alia, the Federal Civil Act and under that Act, there is no requirement that there be any exhaustion of so-called state administrative remedies. *Patsy v. Regents of the State of Florida,* (1982) 457 U.S. 496, 102 S.Ct. 2557.

CONCLUSION

The Motion to Dismiss or Affirm of Appellee should be denied. The issues presented herein are critical and this Court's guidance, direction, and protection are needed not only by the Appellants but also by the farmers/landowners of California and other agriculture states. Delucchis pray that probable jurisdiction be noted or that this Court grant the Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 2103 and Rules of this Court, 17.1(a), (b) and (c).

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